

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL A. DEBERNARDIN

Claimant

VS.

AMERICAN YEARBOOK COMPANY, INC.

Respondent

Self-Insured

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Docket No. 225,835

ORDER

The respondent requested Appeals Board review of the preliminary hearing Order for Compensation entered by Administrative Law Judge Floyd V. Palmer on October 15, 1997.

ISSUES

The respondent raised the following issues for review by the Appeals Board.

- (1) Whether claimant's accidental injury arose out of and in the course of his employment with respondent.
- (2) Whether claimant gave respondent timely notice of accident as required by K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

Both issues raised by the respondent are issues that subject a preliminary hearing order to Appeals Board review. See K.S.A. 44-534a, as amended.

(1) On the date of the alleged injury, June 6, 1997, claimant was employed by the respondent as a digital scaler. Claimant described his job duties as primarily sitting at a computer work station and operating a computer to size school photographs for yearbooks. Claimant was also required to get up and down from his seated position to obtain files and computer disks. After claimant completed the sizing of the photographs, he was required to place them in a job folder and to deliver the job folder to another department for further processing. Consequently, during the course of the day, the claimant was required to frequently get in and out of the chair located at his work station.

On June 6, 1997, claimant had been at work for two-and-one-half hours when he felt a pop in his low back as he was sitting down at his chair located at his work station. Claimant testified he experienced pain in his low back, right hip, and down his right leg. After the incident, claimant got up from the chair and tried to walk off the pain. However, the pain and discomfort continued and claimant notified his supervisor, Valerie Cowan, that he had hurt his low back sitting down in his chair. Claimant testified that Ms. Cowan told him he could go home if he were unable to continue to work. Claimant further testified Ms. Cowan told him that he had a pre-existing problem with his back and, therefore, the injury did not occur at work.

Claimant did leave work on June 6, 1997, and made arrangements on his own to see Ronald C. Kleiner, a chiropractor, later in the day of the incident. Dr. Kleiner saw claimant on June 6, 1997, and June 30, 1997. He diagnosed acute lumbar radiculitis on the right.

Claimant returned to work and continued to work the month of June and into July with pain and discomfort in his low back. Because he was not improving, claimant called his personal physician, Stephen Saylor, M.D., on July 17, 1997, at the Cotton-O'Neil Clinic in Topeka, Kansas. Dr. Saylor referred claimant to the Kansas Orthopedics & Sports Medicine, P.A., in Topeka, Kansas. On July 17, 1997, claimant was examined at the clinic by Joseph E. Mumford, M.D. Dr. Mumford diagnosed a probable right-sided L4-5 herniated nucleus pulposus. The doctor placed claimant on medication and took him off work. The doctor also scheduled the claimant for an epidural steroid injection on July 23, 1997. Claimant made some improvement after the epidural steroid injection. On August 18, 1997, Dr. Mumford returned claimant to light duty work. On the date of the preliminary hearing, October 8, 1997, claimant testified the respondent had not returned him to work and that he had been terminated.

Claimant testified he had a history of low back problems but never had pain radiating down his leg from any of the prior incidents. The latest incident that claimant had with his low back prior to the June 6, 1997, incident occurred in 1995 while he was playing basketball. Claimant testified he received conservative chiropractic treatment at that time and missed a few days of work. However, claimant testified he remained asymptomatic, except for some occasional stiffness, until the incident at work on June 6, 1997.

Respondent contends claimant's injury did not arise out of his employment. Respondent argues the cause or origin of claimant's injury was claimant's personal pre-existing back problem not his employment. The respondent cites the case of Bennett v. Wichita Fence Co., 16 Kan. App. 2d 458, 824 P.2d 1001, *rev. denied* 250 Kan. 804 (1992), in support of its argument.

The Administrative Law Judge granted claimant's request for medical compensation and temporary total disability compensation. The Administrative Law Judge found claimant's low back trouble was at least aggravated by his work activities. The Appeals Board agrees with the Administrative Law Judge and affirms his decision, that claimant's low back injury was caused by his activities while working for the respondent. The Appeals Board finds claimant's pre-existing low back condition became symptomatic at work when he was performing an essential element of his job, i.e., sitting down at his computer work station. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of employment. See Kindel v. Ferco Rental, Inc., 258 Kan. 272, 899 P.2d 1058 (1995). Although claimant had a pre-existing low back condition, such condition is compensable if it is aggravated or accelerated by one's work activities. See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, Syl. ¶ 1, 573 P.2d 1036 (1978).

(2) The respondent further argues that claimant did not give notice of his accident within ten days thereof as required by K.S.A. 44-520. The Administrative Law Judge did not address this issue in his preliminary hearing order. However, in the preliminary hearing transcript respondent specifically raised timely notice as an issue.

The claimant testified he notified respondent that he had hurt his back when he was sitting down at his computer station approximately one hour after the incident occurred. Claimant testified he told his immediate supervisor, Valerie Cowan, of the incident and she notified him that he could go home if he could not continue to work.

Ms. Cowan also testified at the preliminary hearing. Ms. Cowan was asked whether claimant told her about a back problem on June 6, 1997. Ms. Cowan answered, "I don't recall."

At this juncture of the proceedings, the Appeals Board finds that claimant testified unequivocally that he notified his supervisor, Ms. Cowan, he had pain and discomfort in his low back when he sat down at his computer station at work on the June 6, 1997. The Appeals Board concludes Ms. Cowan's testimony did not contradict claimant's testimony as she simply did not recall the incident. Therefore, the Appeals Board finds claimant gave timely notice of his accident to the respondent through his immediate supervisor, Valerie Cowan.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order For Compensation dated October 15, 1997, entered by Administrative Law Judge Floyd V. Palmer should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 1997.

BOARD MEMBER

c: James L. Wisler, Topeka, KS
Kenneth J. Hursh, Overland Park, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director